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No. 82-251

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ESTATE OF HARRY E. WRIGHT, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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July 30, 1982

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QUESTION PRESENTED

Whether the total amount of the gross income of the petitioner estate for the tax years 1970 through 1972 was permanently set aside for a charitable purpose under the terms of its governing instrument, and was therefore fully deductible under Section 642(c) of the Internal Revenue Code of 1954, 26 U.S.C. Section 642(c).

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ESTATE OF HARRY E. WRIGHT, JR.,
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VS.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioner, Estate of Harry E. Wright, Jr., respectfully prays for the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 14, 1982.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Northern District of California, each of which was reported, appear in the Appendix hereto.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on May 14, 1982, and a copy thereof is appended to this Petition in the Appendix hereto.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. Section 642(c) (Section 642(c) of the Internal Revenue Code of 1954): "DEDUCTION FOR AMOUNTS PAID OR PERMANENTLY SET ASIDE FOR A CHARITABLE PURPOSE. — (1) GENERAL RULE. — In the case of an estate or trust (other than a trust meeting the specifications of subpart B), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by section 170(a), relating to deduction for charitable, etc., contributions and gifts) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c) (determined without regard to section 170(c)(2)(A)). If a charitable contribution is paid after the close of such taxable year and on or before the last day of the year following the close of such taxable year, then the trustee or administrator may elect to treat such contribution as paid during such taxable year. The election shall be made at such time and in such manner as the Secretary prescribes by regulations.

"(2) AMOUNTS PERMANENTLY SET ASIDE. — In the case of an estate, and in the case of a trust (other than a trust meeting the specifications of subpart B) required by the terms of its governing instrument to set aside amounts which was —

(A) created on or before October 9, 1969, if —

(i) an irrevocable remainder interest is transferred to or for the use of an organization described in section 170(c), or

(ii) the grantor is at all times after October 9, 1969, under a mental disability to change the terms of the trust; or

(B) established by a will executed on or before October 9, 1969, if —

(i) the testator dies before October 9, 1972, without having republished the will after October 9, 1969, by codicil or otherwise,

(ii) the testator at no time after October 9, 1969, had the right to change the portions of the will which pertain to the trust, or

(iii) the will is not republished by codicil or otherwise before October 9, 1972, and the testator is on such date and at all times thereafter under a mental disability to republish the will by codicil or otherwise,

there shall also be allowable as a deduction in computing its taxable income any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, permanently set aside for a purpose specified in section 170(c), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acuisition, maintenance, or operation of a public cemetery not operated for profit. In the case of a trust, the preceding sentence shall apply only to gross income earned with respect to amounts transferred to the trust before October 9, 1969, or transferred under a will to which subparagraph (B) applies. . . ."

STATEMENT OF THE CASE

The parties have fully stipulated the material facts of the case. The case does not involve a factual dispute. It concerns an interpretation of the relevant statutory and decisional principles governing the facts.

The basic facts are as follows:

Harry E. Wright, Jr. (hereinafter referred to as "Wright") died on November 11, 1969. He left a will dated June 20, 1969, that specifically disinherited his sister, Earline Wright Torecellan (hereinafter referred to as "Torecellan"). After making certain specific bequests, the will directed that the residue of the Estate was to be distributed to such charitable, educational, or other worthy recipients as Wright's attorneys and executors shall select.

The executor of Wright's Estate filed a petition to probate Wright's will in the California Superior Court for the County of Santa Clara. However, Torecellan filed a will contest opposing the probate of the will.

The Harry E. Wright, Jr. Charitable Trust (hereinafter referred to as "Charitable Trust") was subsequently established. It qualified with the Internal Revenue Service as a charitable organization that was tax-exempt under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Section 501(c)(3)). The Charitable Trust was the appointee of the entire residuary Estate of petitioner.

On April 28, 1972, Torecellan, John Thorne (the executor of the petitioner), and the Charitable Trust entered into a Compromise and Settlement Agreement of Torecellan's will contest. Subsequently, the probate court entered an order admitting the will to probate.

On August 3, 1972, Torecellan died. Shortly thereafter, the Charitable Trust and United California Bank (as Torecellan's executor) entered into a new settlement agreement which provided that the entire residuary estate of the petitioner was to be equally divided between the Charitable Trust and Torecellan's Estate. This new settlement agreement was approved by the probate court on April 10, 1973.

The probate court entered an order for partial preliminary distribution of the petitioner under which John Thorne was ordered to pay the sum of Five Hundred Thousand Dollars ($500,000) each to the Estate of Torecellan and to the Charitable Trust, constituting partial distributions of their respective fifty percent (50%) residuary interests under the settlement agreement.

Thereafter, on November 14, 1973, the Superior Court for the County of Santa Clara rendered and entered a declaratory judgment which provided in pertinent part that the Charitable Trust was the residuary legatee of petitioner, that the residuary clause in the will provided for the appointment of the residuary estate only to a properly qualified tax-exempt entity under Internal Revenue Code Section 501(c)(3), and that the Charitable Trust was a properly operating and qualified tax-exempt entity under such Internal Revenue Code section. The declaratory judgment matter was presented in an uncontested manner.

In its amended tax returns, the petitioner claimed a charitable deduction under Internal Revenue Code Section 642(c) in an amount equal to only fifty percent (50%)

of the gross income earned by the Estate during the years 1970 and 1971. The basis for this amount was that fifty percent (50%) of the residuary estate was to be distributed to Torecellan's Estate, a non-charitable interest. Similarly, the 1972 income tax return of the petitioner claimed a charitable deduction for only fifty percent (50%) of its gross income for that year.

During 1974, the petitioner filed re-amended income tax returns for the years 1970, 1971, and 1972 which sought a refund of income taxes paid on the basis that all of the gross income earned by the petitioner during those years (rather than 50% of such income) constituted a charitable deduction under Internal Revenue Code Section 642(c).

The Internal Revenue Service denied this claim for refund on November 28, 1978. Consequently, the petitioner filed the action herein before the United States District Court for the Northern District of California seeking a refund of such income taxes, together with interest thereon.

The matter was presented before the United States District Court on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The District Court granted the respondent's motion for summary judgment and dismissed petitioner's complaint with prejudice. Petitioner's motion for summary judgment was thus denied by the District Court below.

Before the District Court, the petitioner largely rested its case on the cases of *McClung v. Commissioner*, 13 B.T.A. 335 (1928) and *Estate of J.B. Whitehead v. Commissioner of Internal Revenue*, 3 T.C. 40 (1944), affirmed

sub nomine in *Commissioner v. Citizens and Southern National Bank*, 147 F.2d 977 (5th Cir. 1945). These cases involved facts that were remarkably similar to those in petitioner's case. They presented the same legal issue. The courts in each of these cases decided in favor of the taxpayer, adopting the same rationale that the petitioner presented to the courts below in support of its position in this case.

Nonetheless, the respondent contended, and the District Court agreed, that *McClung* was effectively overruled by the United States Supreme Court decision in *Lyeth v. Hoey*, 305 U.S. 188 (1938). The District Court thus found that the petitioner's gross income was not permanently set aside for the years in question until the settlement agreement became final. Thus, only that amount actually paid to the Charitable Trust, equivalent to fifty percent (50%) of the residuary estate, was found to have been properly deductible under Internal Revenue Code Section 642(c), rather than one hundred percent (100%) of the residuary estate which petitioner claimed was permanently set aside.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court. The Court of Appeals found that although *Lyeth v. Hoey* was not decided under the provision of the Internal Revenue Code at issue in this case and it thus does not overrule *McClung v. Commissioner*, the rationale of the court in *Lyeth v. Hoey* was persuasive and applicable to the facts of this case.

Neither the United States District Court below nor the United States Court of Appeals for the Ninth Circuit discussed the applicability of the *Whitehead* and *Citizens and Southern National Bank* decisions to the facts of petitioner's case.

The District Court for the Northern District of California had jurisdiction over this case under 28 U.S.C. Section 1346(a)(1).

ARGUMENT

The decision below should be reviewed because it directly conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Commissioner v. Citizens and Southern National Bank*, 147 F.2d 977 (5th Cir. 1945) concerning the same legal issue.

To reconcile this conflict, and thus afford all United States taxpayers with uniform treatment, it is necessary for the United States Supreme Court to review this case on a writ of certiorari.

In *Citizens and Southern National Bank*, the decedent left his entire estate to a corporation that was to be formed for charitable and educational purposes, subject to the payment of two special bequests and two annuities.

The decedent's widow filed a will contest under which she claimed the entire estate as the sole heir. Her demands were settled under a settlement agreement that paid her the sum of $500,000 (plus sums payable to her under a previous separation agreement).

The charitable and educational corporation was organized two years after the death of the decedent.

The estate contended that its gross income (except the amount paid upon the two special bequests) was entirely deductible because under Section 162(a) of the 1939 Internal Revenue Code (the predecessor to Section 642(c) of the Internal Revenue Code of 1954) the gross income of the estate was, under the will, paid or permanently set aside to a charitable corporation with such gross income to be used exclusively for charitable or educational purposes.

The Internal Revenue Service disagreed and contended that, *inter alia*, the will did not provide for the use of the gross income *exclusively* for charitable or educational purposes.

Both the Tax Court and the United States Court of Appeals for the Fifth Circuit held for the taxpayer. The Tax Court, in a lengthy opinion that thoroughly analyzed the issues, cited and incorporated the case of *McClung v. Commissioner*, 13 B.T.A. 335 (1928) in its decision. The Tax Court stated:

> *"In Hu L. McClung et al., executors*, 13 B.T.A. 335, we said executors could not by their acts change the directions contained in the will. We therefore look to the terms of the will, and apply them to the statute involved." (3 T.C. 40, 49.)

The Tax Court found that it was the testator's intent to devote his estate to charitable or educational uses after the discharge of the special bequests and his contractual obligations. The Court treated the payment of the $500,000 to the widow in settlement of her claim as being *immaterial* to its deductibility under Internal Revenue Code Section

162(a), the predecessor to Internal Revenue Code Section 642(c), the statute that is in issue in petitioner's case. The Court stated:

> ". . . In this matter, the widow was paid $500,000 additional in settlement of her claim to the entire estate. The payment of her claim is not material." (3 T.C. 40, 52.)

Thus, in *Estate of J. B. Whitehead v. Commissioner of Internal Revenue*, 3 T.C. 40 (1944), affirmed *sub nomine* in *Commissioner v. Citizens and Southern National Bank*, 147 F.2d 977 (5th Cir. 1945), the $500,000 payment to the widow under the will contest settlement agreement did not affect the deductibility of the *entire* gross income of the estate under the predecessor statute to the statute at issue in petitioner's case.

The opinion of the United States Court of Appeals for the Ninth Circuit below does not mention the decisions in *Whitehead* and *Citizens and Southern National Bank*. Instead, the Ninth Circuit opines that the reasoning of the United States Supreme Court in *Lyeth v. Hoey*, 305 U.S. 188, 59 S.Ct. 155 (1938) was persuasive and the Ninth Circuit thus elected to follow it. *Lyeth* involved a compromised will contest that involved an entirely different statute than the one presented by the petitioner's case. The issue in *Lyeth* was whether the contesting relative was entitled to treat the funds he received pursuant to the settlement as a tax-exempt "inheritance" under Section 22(b)(3) of the Revenue Act of 1932 (26 U.S.C. Section 22(b)(3), which is the predecessor of Section 102(a) of the Internal Revenue Code of 1954 (26 U.S.C. Section

102(a)). The Court held that the funds received through the settlement agreement constituted a tax-exempt inheritance. In reaching this conclusion, interpreting the applicability of the tax-exempt inheritance statute to the facts of that case, the Supreme Court held that federal law rather than state law should apply.

The petitioner has steadfastly argued, both before the District Court and the Court of Appeals below, that *Lyeth* does not apply to the issue raised by petitioner's case. The petitioner has argued that *Lyeth* involves a judicial interpretation of the word "inheritance" under Section 22(b)(3) of the Revenue Act of 1932. Neither that statute, nor its successor statute, is in issue in petitioner's case. In *Lyeth*, the Court examined the legislative history of that statute and found that the heir acquired the property because of his heirship and thus should be held to have received the property pursuant to the tax exemption granted to the recipients of inheritances.

Lyeth was decided in 1938. The Tax Court decided *Whitehead* in 1944, approximately six years after the decision in *Lyeth*. *Lyeth* was affirmed in *Citizens and Southern National Bank* in 1945.

Thus, neither the Tax Court nor the United States Court of Appeals for the Fifth Circuit applied the decision in *Lyeth* to facts that parallel those of the petitioner's case.

Petitioner thus contends that there are two contrary lines of cases existing in our country that conern the issue presented by this case. This duplicity should be eliminated to streamline and unify the enforcement of our tax laws.

Petitioner further contends that a more equitable, fair, and correct tax result is produced by the line of cases represented by the Fifth Circuit decision in *Citizens and Southern National Bank* than the decision of the Ninth Circuit below in this case. The Fifth Circuit result is more consistent with the legislative policy of Congress to liberally promote charitable contributions. For instance, please see 5 Mertens, *Law of Federal Income Taxation*, Section 31.01, wherein it is stated in pertinent and applicable part:

> "It has been a consistent legislative policy ever since the 1917 Act to permit the deduction of so-called charitable contributions.
>
> "The purpose is no doubt to encourage such contributions, and the provision allowing the deduction is not to be narrowly construed."

Furthermore, even the Ninth Circuit in its opinion below concedes the criticism of its own tax policy which may hamper the administration of estates by leaving characterization of their funds in limbo during the pendency of a will contest. The Ninth Circuit opinion provides an example of such criticism from the text *Federal Income Taxation of Estates and Beneficiaries* 358 (1970), coauthored by M. Ferguson, J. Freeland, and R. Stephens. As reported by the Ninth Circuit, the authors state:

> "As a matter of logic, (this position) would lead to the result that no charitable deduction could ever be allowed for income accumulated or gains allocated to corpus for years in which any outside force seriously threatened the ultimate charitable use. This would mean that whenever the validity of the will was attacked or whenever there were substantial claims against the estate, no deduction could be claimed, except for amounts actually paid out for charity. Even

> though the charities' right were ultimately found to be substantial this would foreclose the deduction, at least in the early period of administration for a great many estates. It is very doubtful Congress intended the deduction to be so restricted."

Thus, granting this writ of certiorari will resolve this conflict between the Courts of Appeals for the Fifth Circuit and the Ninth Circuit, providing a uniform tax treatment to all U.S. taxpayers in the process. Granting the petition for a writ of certiorari will also permit taxpayers in the Ninth Circuit to have the opportunity to attain a more equitable tax treatment with respect to their charitable contributions, coinciding with the liberal Congressional policy that encourages charitable contributions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL GARY CHATZKY
MICHAEL GARY CHATZKY,
A LAW CORPORATION

July 30, 1982

(Appendix follows)

Appendix

In the United States Court of Appeals
For the Ninth Circuit
No. 80-4228
D.C. No. CV-79-1220-WHO

Estate of Harry E. Wright, Jr.,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee.

[Filed May 14, 1982]

OPINION

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding
Argued and submitted October 14, 1981

Before: SCHROEDER and FLETCHER, Circuit Judges, and FITZGERALD,* District Judge.

SCHROEDER, Circuit Judge:

When Harry E. Wright, Jr. died, his will directed the residue of his estate to go to charitable or other worthy causes. As the result of a will contest initiated by his sister and eventually settled, however, only 50% of the residual estate was actually distributed to charitable trusts, and

*Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

the remaining 50% went to the challengers. The issue in this appeal is whether 100% of the income arising from the estate during the period when the will contest was pending is deductible in accordance with appellant's interpretation of the face of the will, or, whether only 50% is deductible in accordance with the actual distribution under the settlement agreement.[1] After disallowance of the deduction, the estate filed a refund suit and, on cross-motions for summary judgment, the district court entered judgment for the government from which the estate appeals.

The statute involved is I.R.C. § 642(c)(2), 26 U.S.C. § 642(c)(2), which provides:

> (2) Amounts permanently set aside.—In the case of an estate . . .
>
> • • •
>
> there shall . . . be allowed as a deduction in computing its taxable income any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, permanently set aside for a [qualified charitable purpose] . . . .

---

[1]The 1970 and 1971 tax returns of the estate reported gross income but no tax liability because all income was claimed as a charitable deduction. In 1974 the estate filed amended 1970 and 1971 returns, claiming a deduction for only 50% of the estate income from that period. A 50% deduction on income was also claimed for 1972. One month later, in June 1974, the estate filed reamended tax returns claiming a charitable deduction for 100% of the estate income for the years 1970, 1971 and 1972. The deductions were not allowed and this refund suit followed. The estate claimed $71,648 plus interest.

The key question is whether, under this statute, income from an estate can be said to be "permanently set aside" by a will during the period when a will contest is pending and when resolution of the will contest ultimately results in a partial distribution to noncharitable beneficiaries. Appellant's reliance is upon *McClung v. Commissioner*, 13 B.T.A. 335 (1928), which presented similar facts under the predecessor statute to I.R.C. § 642(c). The tax court there held that the estate was entitled to a 100% deduction. It reasoned that the residuary legatee under the will became the absolute owner of the residue as of the date of the testator's death and that, under Tennessee law, the contesting heirs took solely under the compromise agreement, not under the will. Characterization of the funds depended on the language of the will and not the actual disposition after settlement of the will contest. It is significant that the decision was reached by following state law.

The Supreme Court's subsequent decision in *Lyeth v. Hoey*, 305 U.S. 188, 59 S. Ct. 155 (1938), demonstrates an entirely different approach to an analogous situation. *Lyeth* also involved a compromised will contest. The issue there, however, was whether the contesting relative was entitled to treat the funds he received pursuant to the settlement as an exempt "inheritance" under the predecessor of I.R.C. § 102(a), 29 U.S.C. § 102(a).[2] The Court held that he was,

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[2] I.R.C. § 102(a), 26 U.S.C. § 102(a), provides: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance."

and rejected the government's argument that the proceeds awarded the challenger were income under the compromise agreement. In reaching that conclusion the Court held that federal and not state law should apply.

Although *Lyeth* was not decided under the provision of the Code at issue here and does not overrule *McClung*, we find that the reasoning of *Lyeth* is persuasive under the present facts and elect to follow it. The paramount concern, for federal tax purposes, is with the real distribution of the funds rather than their normal source. This is a concern of nationwide applicability, and the issue should be governed by federal law. Tax benefits should only be recognized for those funds that are actually received by the charitable concern. Applying this analysis to the specific language of § 642, we cannot say that funds are "permanently set aside" if the will is the subject of a compromised will contest.

This approach has been applied in a similar factual setting to determine the appropriate charitable deductions for the estate in computing the estate tax. The Third Circuit held that the estate could only deduct a part of the residue because "[t]he amount to be deducted for charitable gifts must be computed on the basis of what the charities actually received, not on the basis of what is provided in the will." *In re Sage's Estate*, 122 F.2d 480, 484 (3d Cir. 1941).

Decisions addressing a similar issue under the statute with which we are concerned here, § 642 (or its predecessor), follow this approach and are fully consistent with the result we reach. *Emanuelson v. United States*, 159

F. Supp. 34 (D. Conn. 1958); *Middleton v. United States*, 99 F. Supp. 801 (E.D. Penn. 1951). *See also Fidelity Trust Co. v. United States*, 253 F.2d 407 (3d Cir. 1958); *Genesee Merchants Bank & Trust Co. v. United States*, 37 A.F.T.R. 2d 747 (E.D. Mich. 1976).

We are aware of some criticism of fostering a tax policy which may hamper administration of estates by leaving characterization of their funds "in limbo" during the pendency at a will contest.[3] If a practical problem exists, this case does not illustrate it. The matter has been handled by amendments to the returns and the estate was not prevented from claiming a 100% deduction during the pendency of the will contest. A recent decision of this Circuit lends support for the conclusion that amended returns are appropriate to take into account the effect of a settlement upon a tax return. *Ahmanson Foundation v. United States*, No. 79-3568, slip op. at 5460 (9th Cir. Oct. 30, 1981).

---

[3]An example of such criticism is:

> As a matter of logic, [this position] would lead to the result that no charitable deduction could ever be allowed for income accumulated or gains allocated to corpus for years in which any outside force seriously threatened the ultimate charitable use. This would mean that whenever the validity of the will was attacked or whenever there were substantial claims against the estate, no deduction could be claimed, except for amounts actually paid out for charity. Even though the charity's rights were ultimately found to be substantial this would foreclose the deduction, at least in the early period of administration for a great many estates. It is very doubtful Congress intended the deduction to be so restricted.

M. Ferguson, J. Freeland & R. Stephens, *Federal Income Taxation of Estates and Beneficiaries* 358 (1970).

The estate argues in the alternative that because § 642 (c)(1) allows the estate to treat amounts actually paid in the current year as charitable deductions for the previous year, it should be able to deduct on its 1972 return an additional $500,000 actually paid by the estate to the charitable trust in 1973. This argument does not appear to have been presented below and is not properly raised on appeal. *Shedd's Estate v. Commissioner*, 320 F.2d 638 (9th Cir. 1963). Furthermore, Treas. Reg. 1.642(c)-1(b)(1) states that this election cannot be made for any amount that was already deducted for the taxable year in which the amount was paid.

The record does not include the estate's 1973 tax return. Therefore, this Court cannot determine whether the same amount was deducted twice. Because the issue was not raised below and the record is incomplete, we do not consider the issue.

Affirmed.

United States District Court
Northern District of California

No. C-79-1220 WHO

Estate of Harry E. Wright, Jr.,
Plaintiff,

vs.

United States of America,
Defendant.

[Filed Mar. 28, 1980]

OPINION

The question in this case, involving the amount of a charitable deduction taken pursuant to § 642(c) of the Internal Revenue Code of 1954, 26 U.S.C. § 642(c) (hereinafter cited as "§ 642(c)"), from the gross income of an estate in which a will contest has been settled by agreement, is whether the total amount of the estate's gross income during the period of its administration has been "permanently set aside" for a qualified charitable purpose. Plaintiff claims that state, rather than federal, law applies to find that the charitable interest took the entire residuary estate pursuant to the will and that the contesting heir took her share pursuant to the compromise agreement. Defendant claims, and the Court so holds, that federal law applies so that for the purposes of federal income taxation the terms of the compromise agreement override the terms of the will. Thus, the estate's gross income was not "permanently set aside" for the years in question within the meaning of § 642(c) until the settlement agree-

ment became final. Accordingly, the Court grants defendant's motion for summary judgment and denies plaintiff's motion for summary judgment.

I

A

Plaintiff, Estate of Harry E. Wright, Jr. ("Estate"), brought this action seeking recovery from the defendant, United States of America, of $71,648, plus interest, in income taxes and interest paid by the Estate for the calendar years 1970, 1971, and 1972. The Estate claims that under § 642(c) it is entitled to deduct as a charitable deduction one hundred percent of the gross income earned by it during those years. The defendant disagrees, contending that the Estate is entitled to claim only fifty percent of its gross income as a charitable deduction for those years, because the Estate of Earline Wright Torecellan ("Torecellan's Estate") received fifty percent of the residue of the Estate pursuant to a will contest settlement agreement.

The parties have fully stipulated as to the facts and thus there is no genuine issue of material fact. The matter is presently before the Court on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

B

Harry E. Wright, Jr. ("Wright") died on November 11, 1969, leaving a will dated June 20, 1969, which specifically disinherited his sister, Earline Wright Torecellan ("Torecellan"). Wright's will made certain specific be-

quests and directed that the rest, residue, and remainder of his estate go to such charitable, educational, or other worthy recipients as his attorneys and executors shall select. John B. Thorne ("Thorne") was selected by Wright as executor of his estate.

On November 18, 1969, Thorne filed a petition in the California Superior Court for the County of Santa Clara ("Probate Court") to probate Wright's will. Two days later Torecellan filed a will contest opposing probate of the will on the grounds that Wright was not of sound mind when he executed it, that the will was not executed in the manner and form required by law, and that it was made as a result of undue influence and fraud by Thorne and others. On December 11, 1969, United California Bank ("UCB") was appointed special administrator of the Estate.

On February 10, 1971, the Estate filed an estate tax return, claiming that all the residue of Wright's estate was bequeathed to a charitable, educational, or other worthy recipient, and claiming a charitable deduction in the amount of $1,533,955.76. On May 24, 1971, Thorne established the Harry E. Wright, Jr. Charitable Trust ("Trust"). On July 1, 1971, Thorne appointed to the Trust all right, title, and interest in and to the residuary estate of Wright, pursuant to the power of appointment granted to Thorne and his law firm in the will.

Torecellan, Thorne, and the Trust entered into a compromise and settlement agreement of Torecellan's will contest on April 28, 1972. Under the terms of the settlement, the parties agreed that Thorne and the Trust would

file an action seeking declaratory relief as to the legal effect of the residuary clause in Wright's will, specifically to determine if the clause was a general or a charitable bequest. If the declaratory judgment was obtained adjudging that the bequest was general, the residuary estate would be distributed solely to Torecellan. If the declaratory judgment was obtained adjudging that the bequest was charitable, Torecellan agreed that she would have no interest in or claim to the Estate. Torecellan also dismissed her will contest pursuant to this agreement.

On July 10, 1972, the Probate Court revoked UCB's special letters of administration and appointed Thorne as executor and Torecellan as administratrix to serve jointly. At that time the Probate Court also admitted the will to probate. On July 18, 1972, Thorne and the Trust filed a complaint for declaratory relief in the Superior Court for the County of Santa Clara pursuant to the terms of the April, 1972, settlement agreement.

On August 3, 1972, Torecellan died and UCB was designated as executor of her estate. As a result of her death, the Probate Court appointed Thorne sole executor of the Estate.

On February 15, 1973, the Trust and UCB, as Torecellan's executor, entered into a new settlement agreement. The parties agreed that the death of Torecellan had changed the complexion of the prior settlement arrangements and that it would benefit both parties to adopt a new settlement formula. Accordingly, the new settlement agreement provided that the entire residuary estate of Wright would be divided equally between the Trust and Tore-

cellan's Estate. It also incorporated the provision of the previous settlement agreement that the will should be admitted to probate. However, the new settlement also provided that UCB would stipulate that judgment may be entered for the Trust in the pending declaratory action.

The Probate Court approved the new settlement agreement on April 10, 1973, and entered an order for partial preliminary distribution of the Estate on August 3, 1973, pursuant to which Thorne was ordered to pay to Torecellan's Estate and to the Trust $500,000 each, as a partial distribution of their respective fifty percent residuary interests in the Estate. Prior to this date, Thorne had not made actual distribution to either party.

A judgment and order in the declaratory relief action in the Superior Court was entered on November 14, 1973. This order provided in pertinent part that the Trust was the residuary legatee of Wright's estate. The clerk's file indicates that the matter was uncontested and a stipulation and waiver had been filed.

The Estate, by UCB as Special Administrator, filed United States fiduciary income tax returns for 1970 and 1971, which reported gross income but no tax liability, because all income was claimed as a charitable deduction. The Estate attached a statement to each return which read as follows:

> "Contest of this Will is presently pending. Should Will not be admitted to probate, administrator will amend return to reflect loss of charitable deduction."

In 1974, the Estate filed amended 1970 and 1971 returns to reflect settlement of the will contest. In these returns the Estate claimed a charitable deduction of only fifty percent because fifty percent of the residuary estate was to be distributed to Torcellan's Estate, a noncharitable interest. The 1971 amended return bore the statement: "Settlement of Will Contest entitles Estate to a fifty percent charitable deduction only." Similarly, the Estate's returns for 1972 claimed a charitable deduction for only fifty percent of its gross income for that year.

In 1974, the Estate filed reamended returns for 1970, 1971, and 1972 seeking a refund of taxes paid, claiming that all gross income earned by the Estate in those years, and not fifty percent, could be claimed as a charitable deduction. The Internal Revenue Service denied this claim for refund in November 28, 1978, and the Estate filed the instant suit.

II

The sole issue in this case is whether fifty percent or one hundred percent of the income of the Estate in the years 1970, 1971, and 1972 can be claimed as a charitable deduction under § 642(c). In pertinent part, § 642(c) provides:

> "(1) *General rule.*—In the case of an estate . . . there shall be allowed as a deduction in computing its taxable income . . . any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in section 170(c) (determined without regard to section 170(c)(2)(A)). If a chari-

table contribution is paid after the close of such taxable year and on or before the last day of the year following the close of such taxable year, then the trustee or administrator may elect to treat such contribution as paid during such taxable year. The election shall be made at such time and in such manner as the Secretary prescribes by regulations.

(2) *Amounts permanently set aside.*—In the case of an estate, . . . there shall also be allowed as a deduction in computing its taxable income any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, permanently set aside for a purpose specified in section 170(c), . . ."

The United States concedes that the Trust is a qualifying charitable organization and that the Estate is entitled to claim a charitable deduction for amounts paid to, or "permanently set aside for" the Trust. In order to be entitled to deduct one hundred percent of the income in question pursuant to § 642(c), the Estate must establish that the income was "permanently set aside" for charitable purposes during the 1970, 1971, and 1972 taxable years, as only fifty percent actually was paid to the Trust, the other fifty percent being paid to Torecellan's Estate, a noncharitable interest. The Estate claims that § 642(c) entitles it to deduct one hundred percent of the income in question because the entire residue of the Estate was "permanently set aside for" the qualifying charitable Trust, pursuant to Wright's will which was admitted to probate in 1972. The Estate further claims that the amounts received by Torecellan, equivalent to fifty percent of the residuary estate, were received under the settlement agree-

ment and not under the will and that therefore all of the income earned by the residuary estate was permanently set aside for the charitable beneficiary.

The Estate relies on *McClung v. Commissioner*, 13 B.T.A. 335 (1928). In *McClung*, the decedent's will provided for certain specific bequests and left the residue to the University of Tennessee. In 1915 the executors filed the will for probate but some heirs contested it. In 1919, the University and the heirs entered into a settlement of the will contest, which was approved by the probate court, whereby the heirs and the University each received fifty percent of the residuary estate. The will was thereafter probated. In *McClung*, the issue was whether the estate could deduct, as a charitable deduction under § 219(b) of the Revenue Acts of 1918 and 1921 (a predecessor statute to § 642(c)), certain income earned by the residuary estate in 1920 and 1921, as paid to, or permanently set aside for, the University. The government had conceded that the University qualified as a charitable organization. The Board of Tax Appeals held that *under Tennessee law*, upon being admitted to probate, the University, as the residuary legatee, became the absolute owner of the estate and the contesting heirs took solely under the compromise agreement and not under the will. The Board therefore found that the residue constituted a proper deduction. The Estate in the instant case argues that *McClung* is dispositive of the issue before the Court herein.

The Estate's reliance on *McClung* is misplaced. The *McClung* decision relies on an interpretation of Tennessee law as to whether contesting heirs and the charitable

beneficiary took their shares of the testator's estate pursuant to the will or the compromise agreement. Ten years after *McClung*, in *Lyeth v. Hoey*, 305 U.S. 188 (1938), the United States Supreme Court considered whether property received by an heir under a will contest settlement agreement is property "acquired by inheritance" and therefore not subject to income tax under the federal tax statute in question. The Court of Appeals had applied state law to determine whether the taxpayer had received the property by inheritance or by contract. The Supreme Court reversed, holding that state law could not govern as to the construction of the exemption in the federal statute. Chief Justice Hughes, speaking for a unanimous Court, stated:

> "But when the contestant is an heir and a valid compromise agreement has been made and there is a distribution to the heir from the decedent's estate accordingly, the question whether what the heir has thus received has been 'acquired by inheritance' within the meaning of the federal statute necessarily is a federal question. It is not determined by local characterization.
>
> In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nationwide scheme of taxation.' Congress establishes its own criteria and the state law may control only when the federal taxing act by

> express language or necessary implication makes its operation dependent upon state law. . . . There is no such expression or necessary implication in this instance. Whether what an heir receives from the estate of his ancestor through the compromise of his contest of his ancestor's will should be regarded as within the exemption from the federal tax should not be decided in one way in the case of an heir in Pennsylvania or Minnesota and in another way in the case of an heir in Massachusetts or New York, according to the differing views of the state courts. We think that it was the intention of Congress in establishing this exemption to provide a uniform rule." *Id.* at 193-94 (citations and footnotes omitted).

The Supreme Court then determined that the contesting heir's distributive share of the estate pursuant to the compromise agreement was "acquired by inheritance" within the meaning of the federal statute. Chief Justice Hughes further wrote:

> "While the will was admitted to probate, the decree also required the distribution of the estate in accordance with the compromise and, so far as the latter provided for distribution to the heirs, it overrode the will. So far as the will became effective under the agreement it was because of the heirs' consent and release and in consideration of the distribution they received by reason of their being heirs. * * *." *Id.* at 196.

It is clear that the Estate's contention that the Trust took Wright's entire residuary estate under the will and that Torcellan took its fifty percent interest under the settlement agreement must be rejected under the reasoning of *Lyeth v. Hoey*. As in *Lyeth*, the terms of the compromise

agreement overrode the terms of the will. *Id.* at 196. Federal courts, in the context of determining whether the settlement agreement or the will controls the terms under which a residuary legatee takes a bequest, have adhered to the rule that the terms of the compromise agreement take the place of the terms of the will. *Emanuelson v. United States*, 159 F.Supp. 34, 36 (D. Conn. 1958); *Middleton v. United States*, 99 F.Supp. 801, 803 (E.D. Pa. 1951).

Although the Court has rejected the Estate's argument that the Trust took one hundred percent of the residuary estate through the will and that Torecellan was paid by the Trust according to the settlement, the Court must still determine whether, during 1970 through 1972, the Estate's entire income has been "permanently set aside" for charitable purposes within the meaning of § 642(c) as the parties did not enter into the second settlement agreement until 1973.

In *Genesee Merchants Bank & Trust Co. v. United States*, 76-1 U.S. Tax Cas. ¶ 9212 (E.D. Mich. 1976), the court had a similar issue before it. There the decedent had left two wills. The 1958 will left the bulk of her estate to charity and the 1961 will purported to revoke the 1958 will and leave the estate to the decedent's nurse. The Attorney General and the County Prosecuting Attorney attacked the later will on behalf of the charitable beneficiaries of the 1958 will. Subsequently all interested parties except the Attorney General and the Prosecuting Attorney entered into a will settlement agreement whereby the charitable beneficiaries under the 1958 will would receive

three-fourths of the estate. The Probate Court approved the settlement in 1965, and the Michigan Supreme Court affirmed in 1968, after which the 1958 will was admitted to probate pursuant to the settlement agreement. The estate sought to recover taxes paid on its income for the years 1964, 1965, and 1966, on the ground that such income had been "permanently set aside" for a charitable purpose within the meaning of § 642(c).

The district court in *Genesee Merchants Bank* held that because the settlement did not become final under Michigan law until November, 1965, the plaintiffs were entitled to claim the charitable deduction for the years 1965 and 1966, but not for 1964. The court explained:

> "6 Mertens, *Law of Federal Income Taxation* (Rev.), Section 36.109, states in regards to Section 642(c) prior to the Tax Reform Act of 1969:
>
> 'An amount of income is paid or permanently set aside if the income is appropriated and dedicated finally and for all time *by the will or other instrument* * * * so that there may be no changes which may destroy the character of such action.' (emphasis in original, footnotes omitted)
>
> While plaintiff would apply the relation back doctrine to show its entitlement to the deduction for the years in question, it is clear that Section 642(c) was not satisfied prior to the execution of the compromise agreement. While the amount for the charities was permanently 'set aside' by the terms of the 1958 Will, this Will was wholly ineffective until the 1961 Will was overturned. Prior to the execution of the compromise agreement, thus, there were no funds which were dedicated finally and for all time for a

charitable purpose and plaintiff is not entitled to the deduction for that period. *Fidelity Trust Co. v. United States* [58-1 USTC ¶ 9354], 253 F2d 407 (CA 3, 1958); *Mott v. United States* [72-2 USTC ¶ 9557], 462 F2d 512 (Ct Cl, 1972), *cert den* 409 US 1108.

Moreover, the relation back doctrine has been applied only to those instances where the Will was probated and a compromise agreement was later reached, the courts holding that the agreement would relate back to the date of probate. *Middleton v. United States* [51-2 USTC ¶ 9417], 99 F Supp 801, 803 (DC Pa, 1951); *Emanuelson v. United States* [58-1 USTC ¶ 9298], 159 F Supp 34 (DC Conn, 1958). Neither will was probated until 1968, which is after the years in question.

Although there was uncertainty as to whether the charities were entitled to any income from decedent's estate prior to the execution of the compromise agreement, this uncertainty was resolved when the Circuit Court for the County of Genesee approved the settlement of the parties. The litigation which followed was wholly a result of the Attorney General's refusal to consent to the stipulation, with the issue being resolved by the Michigan Supreme Court in its holding that the Attorney General had no power to prevent a settlement. Thus, under Michigan law, the settlement became final on November 15, 1965." *Id.* at ¶ 9212, p. 83,425.

In *Fidelity Trust Co. v. United States*, 253 F.2d 407 (3d Cir. 1958), cited in *Genesee Merchants Bank, supra*, the Third Circuit Court of Appeals construed § 162(a) of the Internal Revenue Code of 1939, a predecessor statute to § 642(c). The court in *Fidelity Trust* held that the money

which the charities received subsequent to the conclusion of litigation to determine the validity of the exercise of a power of appointment, pursuant to a will, was not "permanently set aside" for charitable purposes during the period of that litigation. Thus, the taxpayer did not fit within the statutory exemption and could not claim the charitable deduction.

The decisions in *Genesee Merchants Bank* and *Fidelity Trust* compel this Court to find that the income received by the Estate from 1970 through 1972 was not "permanently set aside" for charitable purposes within the meaning of § 642(c), entitling the Estate to a one hundred percent deduction. Although the will was admitted to probate in 1972 pursuant to the first settlement agreement, the beneficiary was still in doubt pending the resolution of the declaratory relief action. Until the Probate Court approved the second settlement of the will contest on April 10, 1973, which gave the Trust and Torecellan each a fifty percent interest in Wright's residuary estate, the Estate's income cannot be said to have been "permanently set aside" for the Trust, as required by § 642(c). The will contest brought by an heir of the decedent placed the validity of the entire will in doubt and prior to the exercise of the second compromise agreement no funds were dedicated finally and for all time for a charitable purpose. *Genesee Merchants Bank, supra*, 76-1 U.S. Tax Cas. ¶ 9212 at p. 83,425. In any event, even if the 1973 agreement related back to the date of probate in 1972, it cannot be said that one hundred percent of the income of the residuary estate was "permanently set aside" for charitable purposes as of 1972, as the

1973 agreement expressly gave the Trust only a fifty percent interest in the residuary estate. Thus, only that amount actually paid to the Trust, equivalent to fifty percent of the residue, is properly deductible under § 642 (c), rather than one hundred percent which the Estate claims was "permanently set aside."

In view of the foregoing discussion, the Court need not consider the validity of the declaratory judgment action which determined that the will's residuary clause contained a valid charitable bequest.

It Is Hereby Ordered that defendant's motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED. Defendant will lodge with the Court a form of judgment by April 10, 1980.

Dated: March 27, 1980.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

United States District Court
Northern District of California

No. C-79-1220 WHO

Estate of Harry Wright, Jr.,
Plaintiff,

vs.

United States of America,
Defendant.

[Filed April 15, 1980]

JUDGMENT

This matter came on for hearing on cross-motions for summary judgment. For the reasons set forth in the Court's Opinion filed March 28, 1980, the defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed with prejudice.

Dated: April 14, 1980.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

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Attorney for the Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-79-1220 WHO

Estate of Harry E. Wright, Jr.,
Plaintiff,

vs.

United States of America,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the decision of this court entered in the above-captioned proceeding on the 16th day of April, 1980, by William H. Orrick, United States District Judge.

Respectfully submitted,
Harry Margolis,
A Professional Corporation

By: /s/ Harry Margolis
Attorney at Law
Representing the Plaintiff

Date: May 7, 1980

Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-251

In the Supreme Court of the United States

OCTOBER TERM, 1982

ESTATE OF HARRY E. WRIGHT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Department of Justice
Washington, D.C. 20530
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No. 82-251

ESTATE OF HARRY E. WRIGHT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented by the petition in this federal income tax case is whether the decision below correctly held that only 50% of petitioner's gross income for 1970-1972 was permanently set aside for a charitable purpose pursuant to the terms of its governing instrument, so as to be deductible under Section 642(c)(2) of the Internal Revenue Code of 1954 (26 U.S.C.).

The pertinent facts may be summarized as follows: The decedent, Harry E. Wright, Jr., died on November 11, 1969, leaving a will that directed that his residuary estate should go to "such charitable, educational, or other worthy recipients of whatever kind or nature as my attorneys and executors shall select." Decedent's sister, Earline Wright Torecellan, who had been disinherited, filed an opposition to the will's probate. On April 28, 1972, however, she reached agreement with the executor of decedent's estate and the charitable trust to which the executor had appointed the

estate's residue to allow a declaratory relief action that would determine the effect of a residuary clause in decedent's will. Shortly thereafter, on August 3, 1972, she died and under these changed circumstances a final settlement agreement was effected providing for decedent's residuary estate to be divided equally between Torecellan's estate and the charitable trust. The Probate Court, to which decedent's will had been offered for probate, approved this agreement and ordered a preliminary partial distribution of $500,000 each to the trust and Torecellan's estate. Subsequently, on November 14, 1973, the Superior Court presiding over the declaratory relief action ruled that the charitable trust was the residuary legatee of decedent's estate. The matter was uncontested and a stipulation and waiver was filed (Pet. App. A-8 to A-11).

Initially, petitioner filed fiduciary income tax returns for the years at issue in which it claimed all of its gross income as a charitable deduction. In 1974, petitioner filed amended returns to take into account the settlement of the will contest. These returns claimed a charitable deduction of only 50% of the gross income because 50% of the underlying residuary estate was to be distributed to the contesting heir's estate, a non-charitable interest. Later in 1974, however, petitioner filed reamended returns seeking to deduct as a charitable deduction all the gross income earned by it for the tax years 1970 through 1972. On audit, the Internal Revenue Service denied the claims and petitioner instituted this refund suit in the United States District Court for the Northern District of California.

On cross-motions for summary judgment, the district court ruled for the United States. It reasoned that 100% of petitioner's gross income earned for the years at issue was not deductible as amounts permanently set aside for a charitable purpose when a will contest was pending during that

period and only 50% of the residuary estate was ultimately distributed, in accordance with the settlement agreement, to a charity (Pet. App. A-20 to A-21). The court of appeals affirmed (Pet. App. A-1 to A-6).[1]

1. The decision below correctly held that the decedent's estate was limited to a charitable deduction equal to 50% of its gross income for the years in question.

Section 642(c)(2) of the Code provides, in pertinent part, that an estate is entitled to deduct any amount of gross income "which pursuant to the terms of the governing instrument is, during the taxable year, permanently set aside for [a qualified charitable purpose] * * *." Petitioner contends that it is entitled to claim a charitable contribution deduction of 100% of the estate's gross income for the taxable years in question notwithstanding the fact that only 50% of the estate's residue (and its gross income) was ultimately distributed, pursuant to the settlement agreement, to the charitable trust. In reliance upon *McClung* v. *Commissioner*, 13 B.T.A. 335 (1928), petitioner argued below (Pet. App. A-13 to A-14) that the tax consequences were controlled by the terms of the will which, in petitioner's view, required that the entire income from the residuary estate be "permanently set aside" for the charitable trust.

The court below, however, chose not to follow *McClung*, which turned on the applicable state law.[2] Instead, the lower

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[1]The opinion of the court of appeals is reported at 677 F. 2d 53 (1981).

[2]Under factual circumstances similar to those in the instant case, the Board of Tax Appeals ruled in *McClung* that the entire income from the decedent's residuary estate for the tax years in question was deductible pursuant to the statutory predecessor of Section 642(c) of the Code. The Board concluded that the will explicitly directed the residue of the estate to be left to a specified tax exempt organization and that, in accordance with the applicable state law, the settlement agreement could not nullify

courts relied upon this Court's subsequent decision in *Lyeth* v. *Hoey*, 305 U.S. 188 (1938). There, the question presented was whether an amount paid to an heir by a decedent's estate in compromise of a will contest was exempt from income tax under Section 22(b)(3) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.)), the statutory predecessor of Section 102 of the 1954 Internal Revenue Code. Both of these provisions exempt from income tax the "value of property acquired by bequest, devise or inheritance." This Court first ruled that in deciding the issue, federal, and not state law should apply since "it was the intention of Congress * * * to provide a uniform rule" with respect to federal tax statutes (305 U.S. at 194). Secondly, while holding that the petitioner there had, pursuant to the compromise agreement, acquired his portion of the property by inheritance for purposes of Section 22(b)(3), this Court concluded that to the extent that distribution of the estate was made in accordance with agreement, "it overrode the will" (305 U.S. at 196).

To be sure, as petitioner notes (Pet. 10-11), *Lyeth* involved a different tax statute from that at issue here. There is, however, no reason to suppose that Congress intended that the question of the amount deductible by an estate under Section 642(c) of the Code should be subject to conflicting interpretations of various state laws. *Weir Foundation* v. *United States*, 362 F. Supp. 928 (S.D.N.Y. 1973), aff'd, 508 F. 2d 894 (2d Cir. 1974).[3] Thus, in accordance with *Lyeth* v. *Hoey*, *supra*, the court of appeals

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the terms of the will (13 B.T.A. at 338). As the court of appeals noted (Pet. App. A-3), the characterization of funds in *McClung* by virtue of state law "depended on the language of the will and not the actual disposition after settlement of the will contest."

[3]Cf. *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932), holding that "[s]tate law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." See *United States* v. *Mitchell*, 403 U.S. 190 (1971).

correctly observed (Pet. App. A-4) that "the issue should be governed by federal law" and that "[t]he paramount concern, for federal tax purposes, is with the real distribution of the funds."[4]

Upon application of this analysis to the statutory language of Section 642(c) in the context of the instant case, it is apparent that the final settlement agreement, and not the will, constituted the governing instrument. Pursuant to the probate court order, the actual distribution of the estate's residue (and its gross income) was governed by the settlement agreement. See *Emanuelson* v. *United States*, 159 F. Supp. 34 (Conn. 1958); *Middleton* v. *United States*, 99 F. Supp. 801 (E.D. Pa. 1951). Cf. *Lyeth* v. *Hoey*, *supra*, 305 U.S. at 196. It is equally apparent that the income received by the estate in the taxable years at issue and while the will contest was pending, cannot be said to have been "permanently set aside" for charitable purposes, at least to the extent that the charitable trust did not, under the settlement agreement, receive a vested interest in the residue of the estate. See *Fidelity Trust Co.* v. *United States*, 253 F. 2d 407 (3d Cir. 1958); *Emanuelson* v. *United States*, *supra*; *Genesee Merchants Bank & Trust Co.* v. *United States*, 37 A.F.T.R. 2d 747 (E.D. Mich. 1976). In short, therefore, the statute authorizes a deduction only for the amount of the estate's gross income (*i.e.*, 50%) that was actually received by the charitable trust.

2. *Commissioner* v. *Citizens & Southern National Bank*, 147 F. 2d 977 (5th Cir. 1945), aff'g 3 T.C. 40 (1944), the only appellate decision which petitioner claims (Pet. 8) to

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[4]Cf. *Ahmanson Foundation* v. *United States*, 674 F. 2d 761, 771 (9th Cir. 1981); *In re Sage's Estate*, 122 F. 2d 480, 484 (3d Cir. 1941), cert. denied, 314 U.S. 699 (1942), quoting *Heim* v. *Nee*, 40 F. Supp. 594, 595 (W.D. Mo. 1937) ("[t]he amount to be deducted for * * * charitable gifts must be computed on the basis of what the charities actually received, not on the basis of what is provided in the will.")

conflict with the ruling below, is distinguishable. There, the decedent's will provided that his entire estate was to be distributed to a corporation that would, subject to certain specific bequests, devote the income therefrom exclusively to charitable purposes. The decedent's widow filed suit to contest the will but then agreed to settle her claim for payment of $500,000. While it held that the entire amount of the estate's gross income, less that portion used to pay the above-mentioned bequests, was deductible under the statutory predecessor of Section 642(c), the Tax Court specifically found that the settlement payments to the widow were charged to the estate's corpus accounts (3 T.C. at 52). Accordingly, unlike the instant case, the estate there did not seek to take a charitable deduction for an amount of gross income that was distributed to a non-charitable interest. Moreover, contrary to petitioner's contention (Pet. 9-10), the Tax Court in that case did not state that payment of the $500,000 to the widow in settlement of the will contest was immaterial to its deductibility under the statute. Rather, it merely ruled that such payment was "not material" to whether the testamentary provisions contained in decedent's will, taken as a whole, were charitable in nature (*ibid.*).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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[5]Finally, petitioner's suggestion (Pet. 12) that the decision below "hamper[s] administration of estates by leaving characterization of their funds in limbo" is belied by the facts of this case. As the court of appeals noted (Pet. App. A-5), petitioner was fully able to take into account changed circumstances by the filing of amended returns, to reflect the terms of the settlement agreement. See *Ahmanson Foundation* v. *United States, supra.*

DOJ-1982-09